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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 586

TORA UPSTEAD RYSTAD,
Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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TORA UPSTEAD RYSTAD,
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JOHN P. BOYD, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled matter on June 21, 1957.

CITATION TO OPINIONS BELOW.

The opinion of the court below affirming the judgment of the United States District Court for the West-

ern District of Washington is reported at 246 F.2d 246, appears at pages 31-34 of the record and is printed as an Appendix (App.) hereto. No opinion was written on the denial of rehearing, nor was any opinion written by the District Court. The findings and conclusions of the District Court are printed in the record, pages 17-22.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 21, 1957 (246 F.2d 246; R. 35; App. i). A timely petition for rehearing was denied on September 5, 1957 (246 F.2d 246; R. 37; App. viii). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the Western District of Washington, which denied a petition for a writ of habeas corpus whereby petitioner had sought to determine the legality of her detention pursuant to an order of deportation.

The questions presented are:

1. Whether a prior judgment of the District Court in a suit for declaratory relief precludes petitioner from maintaining the instant proceeding.

2. Whether the order directing petitioner's deportation is unlawful and unconstitutional because

(a) the record before the Immigration and Naturalization Service did not contain "reasonable, substantial and probative evidence" (8 U.S.C. 1252[5][4]) establishing that petitioner was more than a "nominal" member of the Communist Party (Cf. *Galvan v. Press,* 347 U.S. 522, 529; *Rowoldt v. Perfetto,* 228 F.2d 109 [8 Cir., 1950], cert. granted 350 U.S. 993, ordered reargued 354 U.S. 934; reargued October 14, 1957, 26 L.W. 3119).

(b) the Immigration and Naturalization Service refused to produce, as specifically demanded by petitioner, the reports made to the Federal Bureau of Investigation by the sole witness who testified against her (cf. *Jencks v. United States,* 353 U.S. 657);

(c) the Immigration and Naturalization Service permitted the drawing of an inference adverse to petitioner because of her refusal, upon constitutional grounds, to testify in the proceeding (cf. *Gruenwald v. United States,* 353 U.S. 391);

(d) the Immigration and Naturalization Service abused its discretion in denying petitioner's motion to reopen the record for the express purpose of permitting her to rebut the foregoing adverse inference.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

8 U.S.C. 1251(a)(6)(C) reads in pertinent part as follows:

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who——
>
> * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States;"

8 U.S.C. 1252(b)(4) reads in pertinent part as follows:

> "(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, * * * Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that——
>
> * * *
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

The First Amendment to the Constitution of the United States reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exer-

cise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE.

Petitioner, a native of Norway, was admitted to the United States for permanent residence on May 31, 1928; she is married to an American citizen, and has two children who are American citizens (R. 5).

On July 16, 1954—twenty-six years after her lawful admission to this country—petitioner was served with a deportation warrant based upon the charge that she had been, after entry, a member of the Communist Party of the United States. At the subsequent administrative hearing, only one witness was produced by the Government. This witness testified that, as an

undercover operative for the Federal Bureau of Investigation, he had been a member of the Communist Party in Seattle from sometime in 1944 to early in 1947; that between 1945 and 1946 he had issued to petitioner a party membership book or card and some dues stamps, although he was unable to specify the circumstances thereof (Tr. 34, 36);[1] that he had attended some fifteen or twenty "meetings" with petitioner, although again he was unable to specify the circumstances thereof (Tr. 30-31, 39-40) and could be positive that only one of them was a "closed" meeting. Even as to that meeting, he could be sure that petitioner was present only because he "wrote down the names of people that were there so I could put those names in the next report" (Tr. 41). Yet, despite petitioner's demand therefor, that report was not produced. Indeed, when this sole witness recited his "list of names," he first neglected to mention petitioner and did so only upon prompting.[2]

Petitioner's request (Tr. 14) for the production of this witness's reports to the F.B.I. for use in cross-

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[1] "Tr." refers to the "Transcript of Deportation Proceedings" which is included in the record as an exhibit to Government's return to the order to show cause why a writ of habeas corpus should not issue (R. 15).

[2] "Q. Can you name some of the ordinary members of the Holly Park branch?

A. Yes.

Q. Please name some, if you recall their names?

A. Lil Bitney, Les Bitney, Bill Long, Leonard Weaver, Marguerite Weaver, Lee Bernstein, Bert Read, Jr. and Bert Read, Sr.; Bill Corr, Cecilia Corr, Martha Swanson, Pauline Swanson, Robert Dimert; one Fergus, I believe it was Helen Ferguson, if I remember correctly; that is all I can remember offhand. Oh, pardon me, Gus Rystad, and Tora Rystad, Clarence Greenwood. That is all I can think of." (Tr. 9, cf. Tr. 57.)

examination was denied (Tr. 15). Petitioner did not testify at the original hearing and an inference adverse to her was thereupon drawn (Opinion of the Special Inquiry Officer, 3),[3] and her deportation was ordered. The Board of Immigration Appeals affirmed.

Petitioner subsequently moved to reopen the proceeding so that she might testify and present evidence to rebut the inference (R. 15). This motion was denied.

While the motion to reopen was pending, petitioner filed an action in the United States District Court for the Western District of Washington for a review of the administrative proceeding, for declaratory judgment and for injunctive relief (No. 3986) (R. 16). After the Board of Immigration Appeals denied the motion to reopen, the District Court denied the relief prayed for in proceeding 3986. Thereafter petitioner again sought to reopen the record by appropriate motion before the administrative agency, and also moved for a new trial in the District Court. Both of these motions were denied in January of 1956. No further proceedings were then undertaken.

In March of 1956 petitioner was ordered to report for deportation and thereupon filed the instant proceeding, in which, by a petition for a writ of habeas corpus, she challenged the legality of the deportation order upon all of the grounds which are here presented (R. 9-11). The District Court denied the relief requested upon the ground that the decision in No. 3986 was "final and determinative of the issues pre-

[3]This opinion likewise was attached to the return as an exhibit (R. 15).

sented herein", and upon the further ground that the refusal of the Board of Immigration Appeals to grant the second motion to reopen the record did not render the hearing unfair or deny to petitioner due process of law (R. 21-22). The court below affirmed upon substantially the same grounds (246 F.2d 246; R. 31-35; App. i-vi). A petition for rehearing (R. 36 ff.) raising the questions here presented and calling specific attention to this Court's recent decisions in *Jencks v. United States*, 353 U.S. 657, and *Gruenwald v. United States*, 353 U.S. 391; and to the order for reargument in *Rowoldt v. Perfetto*, 354 U.S. 934, was denied without opinion.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in holding that:

1. The prior judgment of the District Court precluded an examination into the merits of the instant proceeding, particularly in view of the changed legal situation brought about by the decisions of this Court in *Jencks v. United States*, 353 U.S. 657, and *Gruenwald v. United States*, 353 U.S. 391, and the ordering of reargument in *Rowoldt v. Perfetto*, 228 F.2d 109 (8 Cir., 1950), cert. granted 350 U.S. 993, ordered reargued 354 U.S. 934, reargued October 14, 1957, 26 L.W. 3119 which matters were all specifically called to the attention of the Court of Appeals on the petition for rehearing.[4]

[4]The cause was argued and submitted for decision below on May 9, 1957 (R. 29). Thereafter the *Gruenwald* and *Jencks* cases were decided, and *Rowoldt* was ordered reargued. These new circumstances were then called to the attention of the court below (R. 36 ff.) to no avail.

2. The order directing petitioner's deportation was lawful and was constitutionally applied to petitioner despite the fact that

(a) the record before the Immigration and Naturalization Service did not contain "reasonable, substantial and probative evidence" (8 U.S.C. 1252[b][4]) establishing that petitioner was more than a "nominal" member of the Communist Party;

(b) the Immigration and Naturalization Service refused to produce, as specifically demanded by petitioner, the reports made to the Federal Bureau of Investigation by the sole witness who testified against her;

(c) the Immigration and Naturalization Service permitted the drawing of an inference adverse to petitioner because of her refusal upon constitutional grounds to testify in the proceeding; and

(d) the Immigration and Naturalization Service abused its discretion in denying petitioner's motion to reopen the record for the express purpose of permitting her to rebut the foregoing adverse inference.

REASONS FOR GRANTING THE WRIT.

The Government proposes to deport petitioner, a 48 year old woman, who has lived in this country for over a quarter of a century, who is married to an American citizen, and who has two native born American citizen children, upon the ground that over ten years ago, and presumably when it was legal to do so, she attended one "closed" meeting of the Communist Party and

was issued a dues book and some dues stamps. The single witness who gave this testimony was unable to recall the details with any specificity whatsoever. Although the witness had made reports to the F.B.I. with relation to these very matters, petitioner's request that such reports be produced was denied. To bolster its weak and uncorroborated case the Government relied upon an "adverse inference" which it claimed it had the right to draw because petitioner, on constitutional grounds, had refused to testify against herself. The court below did not review the record on the merits, but took the view that a prior judicial proceeding in the District Court which had never been reviewed precluded it from doing so.

This case presents several important questions which have not heretofore been decided by this Court. In view of the order directing reargument in *Rowoldt*, it is fair to assume that the question of what constitutes more than nominal membership in the Communist Party is still open. Indeed, there are now, and for some time have been, pending on petitions for writs of certiorari at least two other cases involving substantially the same questions. *Jiminez v. Barber*, No. 25, October Term, 1957, originally filed September 28, 1956 as No. 467, O.T. 1956; *Niukkanen v. Boyd*, 148 F.Supp. 106 (D. Ore.), 241 F.2d 938 (9 Cir.), No. 121, O.T., 1957, originally filed May 13, 1956, as No. 992, O.T., 1956. This Court has held those cases for many months now, presumably pending the outcome of *Rowoldt*. A similar disposition of the instant petition would appear to be both just and appropriate.

In addition to the foregoing, the applicability of either or both the *Jencks* and *Gruenwald* holdings to a deportation proceeding has never been determined here. These questions, we think, call for the issuance of the writ in this case.

1. We turn first, however, to a consideration of the contention that the judgment in Cause No. 3986 precludes an examination of these questions. We think it does not for the following reasons.

Apart from the fact that the two proceedings were radically different in form are the further facts, conceded below (246 F.2d at 248) that (1) the second motion to reopen "differs in some respects from the first, and is supported by affidavits not attached to the first," and (2) in any case that motion "was made and denied after judgment was entered in Cause No. 3986 [and] accordingly was not before the court in that proceeding."

These differences, we submit, are enough to preclude the doctrine of *res judicata* from preventing petitioner from having her day in court on the issues now raised.

In any case, the doctrine has never been held to be a bar where, after the first judgment was entered, there has been a significant change in the law. Thus, in *Blair v. Commissioner of Internal Revenue*, 300 U.S. 5, Chief Justice Hughes for a unanimous court held that the doctrine enunciated in *Tait v. Western Maryland R. Co.*, 289 U.S. 620, that a judgment relating to tax liability for one year was *res judicata* for later years in the absence of a change in facts, was

not applicable where there had been a change in the law brought about by a supervening court decision. Such a change in the law, the Chief Justice said, "cannot justly be ignored" (300 U.S. at 9) in determining the outcome of the second suit. So, here, after the decision in Cause No. 3986, this Court decided the *Jencks* and *Gruenwald* cases, and ordered reargument in the *Rowoldt* case. The changes in the law resulting from those decisions cannot be justly ignored here in determining petitioner's rights.

The same result was obtained when a change in the law occurred during the pendency of an appeal. Thus, in *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, this Court refused to permit an appellant to be prejudiced by the fact that the decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, came down too late for the appellant to raise the question there considered in its jurisdictional statement. This Court regarded the *South-Eastern Underwriters* decision as "a supervening event arising in the course of this [the *State Farm*] litigation" (324 U.S. at 161). So, here, the *Jencks and Gruenwald* decisions, and the order for reargument in *Rowoldt* are supervening events and petitioner should not have been prejudiced by the failure of the court below to consider them.

The supervening decisions in *Jencks* and *Gruenwald* and the pendency of the *Rowoldt* reargument were promptly called to the attention of the court below on the petition for rehearing (R. 36 ff.).

2. On the merits, we believe the writ should be granted for the following reasons.

(a) The record before the administrative agency does not contain "reasonable, substantial and probative evidence" (8 U.S.C. 1252[b][4]) establishing that petitioner was more than a "nominal" member of the Communist Party (cf. *Rowoldt v. Perfetto,* 228 F.2d 109 [8 Cir., 1955], cert. granted 350 U.S. 993, ordered reargued 354 U.S. 934, reargued October 14, 1957, 26 L.W. 3119; *Jiminez v. Barber,* No 25, O.T., 1957, and *Nuikkanen v. Boyd,* No. 121, O.T., 1957, both pending on petition for writs of certiorari).

The Board of Immigration Appeals found that the only witness against petitioner was "unable to recall" the times when petitioner attended party meetings or paid party dues. This witness "could recall only one meeting attended by him and [petitioner] which he could positively state was a closed meeting." It is submitted that proof of attendance as an "ordinary" member[5] at only one Communist Party meeting is not proof by "reasonable, substantial and probative" evidence of a relationship to the Communist Party which is more than nominal. Cf. *Galvan v. Press,* 347 U.S. 522, 529. The issue of what constitutes more than nominal membership, touched upon in *Galvan,* has been submitted to this Court in *Rowoldt,* and it is respectfully submitted that this Court should grant this petition (or at least hold this case as it has done with the *Jiminez* and *Nuikkanen* cases, *supra*), pending the

[5]*Supra,* n. 2.

decision in *Rowoldt*. The court below refused to follow this suggestion, made on rehearing, although it was pointed out to it (R. 36 ff.) that on June 8, 1957 four days after *Rowoldt* was ordered reargued, the Court of Appeals for the District of Columbia ordered rehearing in *Carlisle v. Brownell,* D.C. Cir., No. 13,711, a case involving issues similar to those presented under this point.[6]

(b) The administrative agency denied petitioner due process of law by upholding the refusal of its hearing officer to require, as specifically demanded by petitioner (Tr. 14), the production of the witness' reports to the Federal Bureau of Investigation. These rulings were made prior to this Court's decision in *Jencks v. United States,* 353 U.S. 657, but were called to the attention of the court below in the petition for rehearing (R. 36 ff.). In *Jencks* this Court held that the defendant in a criminal case "was entitled to an order directing the Government to produce for inspection all reports of [the witnesses] in its possession . . . touching the events and activities as to which they testified at the trial" (353 U.S. at 668). This Court made clear that this requirement was imposed upon

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[6]The order in the *Carlisle* case reads: "It is ORDERED by the Court that the above-entitled case be, and it is hereby, set down for rehearing at a time convenient to the Court after the decision of the Supreme Court in *Rowoldt v. Perfetto,* No. 34, October Term, 1956. Per Curiam."

Identical orders have been entered by the same court in *Cherner v. Brownell,* No. 12,877; *Grondahl v. Brownell,* No. 13,158; *Hedge v. Brownell,* No. 13,018; *Martinez v. Brownell,* No. 13,014; *Peyro v. Brownell,* No. 13,703; *Kochi v. Brownell,* No. 13,264 and No. 13,374; *Estrada-Salazar v. Brownell,* No. 13,015; *Ramirez-Salse v. Brownell,* No. 12,852; and *Larson v. Brownell,* No. 13,039.

the Government by the due process clause. "Justice," it said, "requires no less" (353 U.S. at 669).

Following *Jencks,* this Court has reversed other criminal convictions where such reports were not produced. *Scales v. United States,* 355 U.S. ....., No. 3, O.T. 1957; *Lightfoot v. United States,* 355 U.S. ....., No. 4, O.T. 1957. So has one Court of Appeals on rehearing *(Killian v. United States.* 246 F.2d 77 [7 Cir., 1957]), although initially the conviction had been affirmed. See, also, *United States v. Matles,* E.D. N.Y., Civ. No. 13, 121, July 11, 1957, a denaturalization case wherein an order adverse to the respondent was set aside and a new trial ordered because of the failure to comply with the *Jencks* rule.

It is submitted that what due process, or "justice", requires in a criminal or denaturalization case may not be dispensed with in a deportation case. Cf. *Bridges v. Wixon,* 326 U.S. 135 (1945); *Mangoang v. Boyd,* 186 F.2d 199 (9 Cir., 1950); *Schoeps v. Carmichael,* 177 F.2d 391 (9 Cir., 1949). Clearly, if due process requires the production of such reports in criminal and denaturalization cases, it can hardly be argued that this requirement is inapplicable to a deportation proceeding which may, and in this case will, result in the loss "of all that makes life worth living" *(Ng Fung Ho v. White,* 259 U.S. 276, 284).

To determine the applicability of the *Jencks* rule to deportation cases, the writ should be issued here.

(c) The administrative agency denied petitioner due process of law by holding that its hearing officer

could draw an adverse inference from petitioner's silence. This ruling was made prior to the decision of this Court in *Gruenwald v. United States,* 353 U.S. 391, which, in reversing a conviction because the prosecutor had inquired of the defendant about his prior invocation of his Fifth Amendment privilege against self-incrimination, emphasized that "no implication of guilt could be drawn from [the defendant's] invocation of his Fifth Amendment privilege . . ." (353 U.S. at 421). The Court cited with approval Dean Griswold's observation that

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." (353 U.S. at 421.)

The Court gave the dispositive answer to this claim by referring to its earlier decision in *Slochower v. Board of Higher Education,* 350 U.S. 551, where it had said:

> "The privilege serves to protect the innocent who otherwise might be enmeshed by ambiguous circumstances." (350 U.S. at 557-558.)

The *Gruenwald* ruling was called to the attention of the court below on rehearing (R. 36 ff.), as was the fact that after the decision in that case, the Court of Appeals for the Tenth Circuit reversed a conviction because the prosecutor was permitted to bring to the jury's attention, through the cross-examination of de-

fense character witnesses, the fact that on a prior occasion the defendant had refused to answer questions on the ground that his answers might incriminate him (*Travis v. United States*, 247 F.2d 130 [10 Cir.]). There the court said:

> "One who claims the rights and privileges of the Constitution most certainly does not exhibit a character defect of any kind and, if one who lawfully asserts the shelter of the Fifth Amendment becomes, in so doing, a person of guilt or a perjurer in the minds of some, the shame lies with those who misunderstand and not with him who is entitled to protection." (247 F.2d at 133.)

We submit that the same reasons which prohibit a court in a criminal case from drawing adverse inferences because of a defendant's prior reliance on his Fifth Amendment privilege, also prohibit an administrative agency from drawing such inferences in a deportation case in which the alien refuses to testify, basing her refusal upon the due process clause.

(d) Apart from the foregoing, it is clear that the Immigration and Naturalization Service abused its discretion in denying petitioner's motion to reopen the record after she had learned that an adverse inference was to be drawn against her by virtue of her silence. The record here reveals that after she learned that fact she sought to rebut that inference (Motion to Reopen Hearing filed July 28, 1955, and Order thereon dated September 15, 1955).[7] The denial of this

[7]This document is a part of Exhibit B attached to the return to the order to show cause herein (R. 15).

motion underlines the extent to which petitioner was deprived of due process of law on this issue.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue and the judgment below be reversed.

Dated, San Francisco, California,
November 1957.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioner.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

Tora Upstead Rystad, Appellant, vs. John P. Boyd, District Director, Immigration and Naturalization Service, Appellee	No. 15,204 June 21, 1957

Appeal from the United States District Court for
the Western District of Washington,
Northern Division.

Before: BONE, LEMMON, and HAMLEY, Circuit Judges

HAMLEY, Circuit Judge:

In this proceeding, petitioner, challenging the legality of an order for her deportation, seeks a writ of habeas corpus, declaratory judgment, and injunctive relief. The trial court, after hearing, dismissed the proceeding on the ground that the judgment entered in a prior cause was final and determinative of all issues presented. Petitioner appeals.

Appellant, a native of Norway, has resided continuously in the United States since May 31, 1928. On

July 16, 1954, she was served with a deportation warrant based upon the charge that she had become a member of the Communist Party of the United States (§ 241 (a), Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1251 (a). A hearing on this charge was held on August 24, 1954, before a Special Inquiry Officer of the Immigration and Naturalization Service. She was represented by counsel at this hearing.

When the evidence submitted on behalf of appellee had been received, appellant requested and received a continuance of the hearing for twenty-eight days, so that she could prepare her defense. Upon the resumption of the hearing on September 21, 1954, counsel for appellant moved to dismiss the charges. The motion was denied. Appellant did not testify in her own defense or offer any other evidence. The Special Inquiry Officer found that appellant was a member of the Communist Party of the United States in 1945 and 1946. He concluded that she was therefore subject to deportation, and entered such an order.

Appellant appealed to the Board of Immigration Appeals, which affirmed the order of the Special Inquiry Officer. Appellant then filed with the board a motion to reopen the proceedings for the purpose of presenting new evidence, including her own sworn testimony.

While this motion was pending before the board, appellant instituted a proceeding in the district court (cause No. 3986) for review of administrative proceedings, declaratory judgment, and injunctive relief. On

September 15, 1955, the board denied appellant's motion to reopen and for suspension of deportation. On November 10, 1955, judgment was entered in cause No. 3986, denying the relief prayed for. On November 21, 1955, appellant filed a motion for a new trial in cause No. 3986. On the same day, she filed a motion with the board entitled "Renewal of Motion to Reopen Hearing on the Ground of, and for the Purpose of Presenting, New Evidence."

The motion for new trial was denied on January 4, 1956. No appeal was taken from the adverse judgment entered in cause No. 3986. The board, on January 25, 1956, denied appellant's second motion to reopen the deportation hearing. Appellant was ordered to report for deportation on March 27, 1956. One day prior to the scheduled deportation, she filed the instant proceeding.

In this proceeding, appellant advances two reasons for contending that the order of deportation was erroneously entered. The first of these is that the finding that appellant had been a member of the Communist Party of the United States in 1945 and 1946 is not supported by substantial evidence. In this connection, it is argued that the only witness for the government was a paid informer whose testimony, for that reason, is unworthy of belief; that his testimony was unreliable because he was testifying as to events which had occurred over nine years previously; and that the Special Inquiry Officer should not have drawn an inference adverse to appellant from the fact that she did not testify at the hearing.

Each of these contentions was made, considered, and rejected in cause No. 3986. This court has recently held that persons desiring to challenge deportation orders are not permitted cumulative remedies by habeas corpus and declaratory petition, respectively or in reverse order. Leonard Cruz-Sanchez v. Robinson, (9 Cir.) .....F. (2d)....., decided June 15, 1957. In the instant case, a declaratory judgment was sought both times, a writ of habeas corpus being sought as additional relief in the second proceeding, now under review. We hold that the determination made in cause No. 3986, to the effect that the evidence was sufficient to support the order of deportation, was final and determinative of this issue.

The second reason advanced by appellant in support of her contention that the order of deportation was erroneously entered is that the board should have granted her second motion to reopen the deportation proceeding to receive the testimony of appellant and other witnesses.

This reason is included in the specification of error (denominated in appellant's brief as "Appellant's Points on Appeal"). It is not, however, discussed in the brief, except for a one-sentence restatement of the contention. Nor was it argued orally before this court. Where an appellant's point has not been argued in his brief, or orally, the point is deemed to be abandoned. Western Nat. Ins. Co. v. Le Clare, (9 Cir.) 163 F. (2d) 337.

We have nevertheless considered the point as if properly presented for our determination. This second

motion to reopen the deportation proceedings was made and denied after judgment was entered in cause No. 3986. Accordingly, it was not before the court in that proceeding. The second motion is, in a general way, similar to the first motion to reopen the deportation proceedings, the denial of which was adjudicated adversely to appellant in cause No. 3986. But since the second motion differs in some respects from the first one, and is supported by affidavits not attached to the first, we will not regard the judgment in cause No. 3986 as determinative of the propriety of denying the second motion.

In its opinion and order denying the second motion, the board noted that, in connection with the first motion for reopening, it had been alleged that every person named by the government witness had been contacted and each had stated that appellant had never attended communist meetings. The board then pointed out that only one of the five affidavits submitted with the second motion is represented as being from one of the nineteen persons named by the government witness at the deportation proceedings. The board also expressed the view that all five affiants appeared to have been quite friendly with appellant, and hence they could have been produced as witnesses at the September 21, 1954, hearing.

The board's opinion denying the second motion to reopen contains a detailed analysis of the testimony of the government witness, the conclusion being reached that such testimony is entirely reliable. Reference is also made to the fact that, on September 21,

1954, appellant, although knowing that the Special Inquiry Officer considered that a prima facie case had been made out by the government, chose to remain silent and did not present any evidence. She adopted this attitude notwithstanding the fact that, upon her request, the hearing had been continued twenty-eight days for the express purpose of permitting her to present her case.

A review of all of the circumstances of this case convinces us that the board did not abuse its discretion in declining to reopen the deportation proceedings. The failure to reopen such proceedings did not reprive appellant of due process of law.

Affirmed.

LEMMON, Circuit Judge, concurring:

I concur in affirming the judgment but am constrained to add that this appeal is devoid of the semblance of merit. It should be stamped for what it is, a frivolous appeal. I would go further and adjudge appellant's counsel in contempt of court in taking up the time of this busy court with this frivolity. He should be punished for doing so.

(Endorsed:) Opinion and Concurring Opinion. Filed June 21, 1957. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

Tora Upstead Rystad, Appellant, vs. John P. Boyd, District Director, Immigration and Naturalization Service, Appellee.	No. 15,204

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration thereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: June 21, 1957
Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, September 5, 1957.

Before: Bone, Lemmon and Hamley, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed August 19, 1957, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

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No. 586

In the Supreme Court of the United States

OCTOBER TERM, 1957

TORA UPSTEAD RYSTAD, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
RUFUS D. McLEAN,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
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Attorneys,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 586

TORA UPSTEAD RYSTAD, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The majority and concurring opinions of the Court of Appeals (R. 31–34) are reported at 246 F. 2d 246. The findings of fact and conclusions of law of the District Court appear at R. 17–22.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1957 (R. 35). A petition for rehearing was denied on September 5, 1957 (R. 37). The petition for a writ of certiorari was filed on October 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court's prior, unappealed, decision upholding the validity of the order deporting petitioner was final and determinative of the issues in the instant case.

2. Whether the Immigration and Naturalization Service hearing officer erred in denying petitioner access to F. B. I. reports prepared by the testifying government witness.

3. Whether the Immigration and Naturalization Service hearing officer erred in drawing an adverse inference from petitioner's refusal to testify after he advised her that the government's evidence had shown that she had been a Communist Party member and there was no contradictory evidence.

4. Whether the order for the deportation of petitioner as one who, after entry, had been a member of the Communist Party is based on reasonable, substantial and probative evidence.

STATUTE INVOLVED

8 U. S. C. 1251 (a):

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United

States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or * * *

* * * * *

STATEMENT

Petitioner, born in Norway in 1909, was ordered deported after a hearing in August and September 1954 on the ground that, after entry in 1928 and 1938, she had been a member of the Communist Party in 1945 and 1946 (I. F. 60–64).[1] At the hearing before a special inquiry officer of the Immigration and Naturalization Service, the evidence in support of this conclusion was presented by government witness Fred L. Thornburgh, who, with the knowledge of and with payment by the F. B. I., had been a member of the Communist Party from 1942 through 1947 (I. F. 6–8, 14).

In 1944, Mr. Thornburgh transferred to the Holly Park Branch of the Communist Party of the United States, Seattle, Washington, and became membership director of that Branch either in 1945 or 1946 (I. F. 8, 9).[2] As such director, he kept track of the party

[1] The designation "I. F." refers to the Immigration and Naturalization Service file. It is lodged with the Clerk of this Court.

[2] By 1945 the organization had changed back its name from the Communist Political Association to the Communist Party of the United States (I. F. 13).

membership and issued the dues stamps and membership books (I. F. 10, 27, 33). He had no specific recollection of the time when he gave a membership book to petitioner but he is certain that he made one out in her name (I. F. 35, 54). He also issued stamps to her which indicated payment of dues by her but could not remember any specific instances of issuing stamps to her (I. F. 33, 37). In response to a question of whether he could name some of the ordinary members of the Holly Park Branch, he named several names without mentioning petitioner and then said (I. F. 9): "that is all I can remember offhand. Oh, pardon me, Gus Rystad, and Tora Rystad, Clarence Greenwood. That is all I can think of." He identified petitioner at the hearing as a member who attended 15 to 20 Communist Party meetings (I. F. 9, 11). He testified that some of the meetings were closed (I. F. 12), and remembered one particular "important" closed meeting which petitioner attended and which was held in a member's home (I. F. 40). On cross-examination, in response to a question as to whether the witness remembered seeing petitioner at any closed meetings, he said "No particular meeting that I can pick out from any other meeting" (R. 50). Later, he said that there was "no doubt" that petitioner attended "a closed meeting" (R. 54). He also said that petitioner was not a particularly active member of the unit (I. F. 12).

Mr. Thornburgh testified from memory. He did not use notes to refresh his recollection (I. F. 37). He testified that during his Communist Party membership

he made reports to the F. B. I. concerning the activities and membership of the Communist Party and also indicated that the F. B. I. had photostatic copies of the membership cards (I. F. 8, 38).

During the hearing, petitioner requested the F. B. I. reports prepared by the government witness. The request was denied on the grounds that the reports were confidential and that the witness did not use the reports to refresh his memory and that the witness himself was present (I. F. 14–15).

At the conclusion of the government's case, petitioner did not take the stand nor testify in her own behalf nor produce any evidence on her behalf. She was given a continuance of 28 days from August 24 to September 21, 1954, to present her case (I. F. 56). At the reconvened hearing on September 21, 1954, despite the fact that the hearing officer advised petitioner that evidence presented by the government showed that she was a Communist Party member and that under these circumstances petitioner had a duty to speak, no evidence was produced by petitioner or upon her behalf (I. F. 58).

On September 27, 1954, the special inquiry officer of the Immigration and Naturalization Service found that petitioner was an alien who had been a member of the Communist Party of the United States in 1945 and 1946, and hence deportable (I. F. 60–61). He based this conclusion on the testimony of Mr. Thornburgh who, he said, was unable to recall many details, but whose testimony he found credible (I. F. 62–63). He said that petitioner had presented no evidence and

added that (I. F. 62), "Although given full opportunity to speak, respondent remained silent. The burden of going forward with the evidence [after the government had shown that petitioner had been a Communist Party member] was on the respondent, a burden which she did not assume. Under these circumstances an adverse inference can be drawn from her silence and can be properly considered as evidence in the case. In a deportation proceeding the respondent is under a duty to speak and where there is a duty to speak, silence is evidence of a most persuasive character."

On appeal to the Board of Immigration Appeals, petitioner contended that on the basis of this Court's decision in *Galvan* v. *Press*, 347 U. S. 522, decided in May, 1954, prior to the hearing in this case, she was at most a nominal member of the Communist Party, that the order of deportation was not supported by substantial evidence, that the F. B. I. reports should have been shown to her, and that no adverse inference should have been drawn from her refusal to testify (I. F. 65–72). On March 8, 1955, the Board of Immigration Appeals affirmed the order of deportation (I. F. 74–79). It held that the decision of the special inquiry officer was supported by the evidence and that the officer committed no error in denying petitioner's motion to produce F. B. I. confidential records and in drawing an adverse inference from petitioner's failure to testify (I. F. 75–78).

On July 28, 1955, petitioner filed a motion to reopen the proceedings before the Board, solely for the pur-

pose of presenting evidence on her behalf to show that she had never been a member of the Communist Party. The attorney's affidavit attached to the motion stated that he intended to controvert the testimony of Mr. Thornburgh by introducing testimony of persons named by Mr. Thornburgh as belonging to the Holly Park Branch Communist Party of the United States in 1945 and 1946 and by obtaining, if at all possible, the F. B. I. records—all of which would tend to show that petitioner had never been a member of the Communist Party. Counsel also indicated that, from conversations he had had with witness Thornburgh, the witness had some doubts as to whether petitioner had been a member of the Communist Party, as he had testified at the hearing (I. F. 81–91).

On August 10, 1955, petitioner was ordered to appear for deportation and a stay of deportation was refused (see I. F. 94, 98). On August 9, 1955, she filed an action in the United States District Court for a judicial review of the administrative proceedings, a declaratory judgment, and injunctive relief (R. 16), on substantially the same grounds as those urged before the Board of Immigration Appeals. On September 15, 1955, the Board of Immigration Appeals denied petitioner's motion to reopen (I. F. 101). It said that the Immigration and Naturalization Service had submitted an affidavit by Mr. Thornburgh in which he asserted that all of the testimony given by him at the trial was true and that he had no intention of retracting or changing that testimony (Ex. B). As to the other evidence which petitioner's coun-

sel claimed he would introduce at a reopened hearing and which he alleged would show that petitioner had never been a Communist Party member, the Board said that this claim was unsupported by any affidavits or statements from the individuals with whom counsel said he had spoken. Furthermore, the Board found that petitioner had had ample opportunity to present such evidence at the hearing, particularly since she had been given a 28-day continuance to present evidence and she produced none at the reopened hearing. Also, before the hearing was concluded she had been informed that her silence would be used against her, and she still refused to speak. Accordingly, the Board concluded that she had already been granted a fair hearing (I. F. 101–103).

On November 10, 1955, the District Court denied petitioner the relief she requested (R. 16, 20). It found that the administrative proceedings were "supported by reasonable, substantial and probative evidence," and that there was no denial of due process to the petitioner (R. 21; Ex. C).

On November 21, 1955, petitioner filed a motion for a new trial in the District Court, contending that the court had erred in its decision and stating that petitioner had just filed another motion to reopen the hearing for the purpose of presenting new evidence (R. 20–21). Attached to the new motion before the Board were 5 affidavits by persons closely acquainted with petitioner who alleged that they did not believe that petitioner had ever been a member of the Communist Party. Only one of the affidavits was by any

of the 19 persons named by Mr. Thornburgh as members of the Holly Park Branch Communist Party when petitioner was, as testified by Mr. Thornburgh, such a member (Ex. D). In January 1956, the Board of Immigration Appeals denied this renewed motion, saying that her Party membership had been established by credible evidence and petitioner had not made any showing that her evidence could not have been presented at the hearing (R. 21).

Petitioner did not appeal from the District Court judgment of November 10, 1955, and was ordered to report for deportation on March 27, 1956 (R. 21).

On March 26, 1956, the instant proceedings for a writ of habeas corpus, declaratory judgment, and injunctive relief, challenging the order of deportation, were instituted in the District Court (R. 3–12). In its return to the court's order to show cause, the government summarized the foregoing events and asked for a dismissal of the petition on the grounds that petitioner had been accorded a full and fair hearing and that the order of deportation was supported by substantial evidence (R. 14–17). The District Court denied the relief requested by petitioner. It found that her case had already been judicially reviewed and that in the previous proceeding the court had held that the order was supported "by reasonable, substantial and probative evidence, and that there was no denial of due process to the petitioner therein" (R. 21). The court held the earlier judgment to be final. It also found that the denial of the renewal of the motion to reopen, after the previous judicial re-

view, "did not deny petitioner due process nor did it render the hearing unfair" (R. 21–23). The Court of Appeals affirmed (R. 35).

ARGUMENT

1. Petitioner contends that the courts below should not have given controlling weight to her prior proceeding for judicial review, from which she chose not to appeal. Although, technically speaking, the doctrine of *res judicata* does not usually apply to habeas corpus proceedings, the courts may nevertheless give controlling weight to a prior action raising the same issues. *Salinger* v. *Loisel,* 265 U. S. 224; *Collins* v. *Loisel,* 262 U. S. 426. The same rationale applies to a prior action for declaratory judgment seeking the same relief as would have been available by habeas corpus. Section 10 (b) of the Administrative Procedure Act, 5 U. S. C. 1009 (b), which provides for judicial review of administrative proceedings, states that such action may be instituted by "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)." See *Shaughnessy* v. *Pedreiro,* 349 U. S. 48. Certainly, Congress by this language intended that there should normally be only one judicial review, and not successive reviews in each of the different forms referred to in Section 10.[3] *Cruz-Sanchez* v. *Robinson,*

[3] Compare 28 U. S. C. 2244 and 2255 (5th paragraph), which indicates a tendency on the part of Congress to limit the practice of suing out successive and repetitious writs of habeas corpus and other like remedies.

136 F. Supp. 52 (D. Cal.); see also *Shaughnessy* v. *Pedreiro, supra,* at p. 53; *Herman* v. *Gilliland,* 218 F. 2d 852 (C. A. D. C.); *In re Federal Water & Gas Corp.,* 188 F. 2d 100 (C. A. 3), certiorari denied, *sub nom. Chenery Corp.* v. *Securities & Exchange Commission,* 340 U. S. 831.

Petitioner's first action in the District Court was based substantially on the same grounds as the instant second case. The only added factor in the second case was the filing before the Board of Immigration Appeals of the renewal of the motion to reopen. But that motion was not different from the first motion to reopen which was denied by the Board of Immigration Appeals before the District Court acted on the first case (*supra,* pp. 6–7, 8–9). The only new matter in the second motion was the presentation of the 5 affidavits; and only one of these affidavits was by any of the many persons named by Mr. Thornburgh as having attended Communist Party meetings with petitioner. Furthermore, all the affiants were closely acquainted with petitioner and apparently could have been produced at the original administrative hearing. Petitioner does not give any real reason why they were not produced.

Petitioner's conduct throughout these proceedings suggests tactics of delay. After obtaining an adjournment of the administrative hearing to put in evidence, she did not do so. She waited until after an adverse decision by the Board of Immigration Appeals to claim that she had evidence favorable to her case. After an unfavorable decision by the Dis-

trict Court, she did not pursue her appeal. Instead, she made a second motion to reopen before the Board of Immigration Appeals without offering any substantial new grounds, and then, on that flimsy basis, started a new judicial proceeding in the District Court. The courts below were not required to give their approval to such maneuvers.

2. Recognizing that this second action is a duplication of the first, petitioner seeks (Pet. 11–12) to avoid the doctrine discountenancing repetitious litigation by alleging that a significant change in law occurred during the interim between the two actions. But such is not the case.

(*a*) Petitioner first seeks (Pet. 14–15) to extend this Court's decision in *Jencks* v. *United States*, 353 U. S. 657, to deportation hearings. She argues that the refusal of the special inquiry officer, in her hearing before the Immigration and Naturalization Service, to require production of the F. B. I. reports involving her which witness Thornburgh made while he was a member of the Communist Party constituted a denial of due process. But we do not believe that *Jencks* controls the disposition of the instant case. That decision was limited to criminal proceedings. The Court expressly recognized the authority of the Attorney General (see fns. 16 and 17, p. 670) to adopt regulations making Department of Justice records confidential, but the Court qualified its acceptance of that authority by the holding that "in criminal causes '. . . the Government can invoke its evidentiary privileges only at the price of letting the de-

fendant go free. * * *' ". By Public Law 85–269, 85th Cong., 1st Sess. (18 U. S. C. 3500), enacted on September 2, 1957, Congress embodied the *Jencks* decision into statutory law. S. Rept. No. 981, p. 2; H. Rept. No. 700, pp. 2–3 (85th Cong., 1st Sess.). By express provision, the statute, which requires the production of statements and reports of witnesses, expressly limits such production to "criminal prosecution[s] brought by the United States." Accordingly, the general rule that Department of Justice records are confidential and do not have to be produced still controls in deportation hearings.[4] A long line of decisions by this Court holds that deportation proceedings, however dire the consequences, cannot be considered criminal. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594–595; *Mahler* v. *Eby*, 264 U. S. 32, 39; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Lees* v. *United States*, 150 U. S. 476, 480; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730.

Nor can it be said that *Jencks* establishes that the procedure there laid down is necessary to due process of law in all proceedings. Rather, it enunciated a rule, comparable to a rule of evidence, to be followed by the federal courts in criminal cases. Administrative proceedings, on the other hand, need not follow

[4] See the interlocutory ruling of the National Labor Relations Board (one member dissenting) in *The Great Atlantic and Pacific Tea Company* v. *Independent Bakery Workers Union* and *The Great Atlantic and Pacific Tea Company* v. *Smith*, 40 Labor Relations Reference Manual (1957), pp. 1338–1342. Because of the pendency of settlement negotiations, the hearings on the merits of these cases have not been initiated.

judicial rules of evidence. The evidence need only be relevant and material; and the final determination need only be supported by "reasonable, substantial and probative evidence" (Immigration and Nationality Act of 1952, 8 U. S. C. 1252 (b)). The "* * * differences in origin and function * * *" of administrative agencies [such as the Immigration and Naturalization Service] "* * * preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts." *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 142–144. Therefore, the failure of an administrative agency to apply a procedure which the federal courts are required to follow in criminal cases does not, in itself, result in a failure to afford a fair hearing. The true test is whether, all circumstances considered and with due regard for the nature of the proceedings, the petitioner has received a fair hearing.[5] Here, the witness did not testify from notes but from his independent recollection. Under the rule of *Goldman* v. *United States*, 316 U. S. 129, 132, production would not have been required in such circumstances, even in a criminal case. And, as we have shown, there is no reason to believe that petitioner encountered any fundamental unfairness at her hearing.

---

[5] *United States* v. *Matles*, (E. D. N. Y., decided July 11, 1957), a denaturalization proceeding where a new trial was ordered because of failure to comply with the *Jencks* case, and upon which petitioner relies (Pet. 15), involves a judicial proceeding rather than an administrative hearing.

(*b*) The hearing officer did not commit any error when he drew an adverse inference from petitioner's silence, as this Court has consistently held. *Mahler* v. *Eby*, 264 U. S. 32; *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–155; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 111; *United States ex rel. Circella* v. *Neely*, 115 F. Supp. 615 (N. D. Ill.), affirmed, 216 F. 2d 33 (C. A. 7) *sub nom United States* v. *Sahli*, certiorari denied, 348 U. S. 964. He first warned petitioner that the government's evidence showed that she had been a member of the Communist Party and indicated that, without more evidence, he would so find. Petitioner chose to let that evidence stand rather than introduce any evidence in her own behalf. Thus, the hearing officer's drawing of the adverse inference was in reality a perfectly proper statement that the government had presented a prima facie case which petitioner was called upon to rebut.

Petitioner's reliance on the Court's recent decision in *Grunewald* v. *United States*, 353 U. S. 391, is incorrect. As she herself notes, *Grunewald* involved criminal proceedings where the failure of the accused to take the stand may not be the subject of an adverse inference. Moreover, Halperin (in that case) had invoked the Fifth Amendment and the Court held that no inference of guilt could be drawn from the invocation of a constitutional privilege. Petitioner here did not claim any privilege but simply refused to offer any evidence on her own behalf, leaving the government's evidence uncontradicted; in those circumstances, this Court has uniformly held in deportation cases that it is not error to rely on that silence.

3. As held by the District Court in the first action, there was sufficient probative evidence at the deportation hearing to support the finding that petitioner was a knowing member of the Communist Party during 1945 and 1946. That evidence was to the effect that petitioner was a card-carrying, dues-paying, meeting-attending, member of the Party. See *supra*, pp. 3–4. The issue of Mr. Thornburgh's credibility was for the trier of facts to determine, not for the District Court on habeas corpus proceedings. The special inquiry officer found the witness credible, despite his inability to remember details.

In moving before the Board of Immigration Appeals to reopen the proceedings, petitioner alleged that she would now show that she was never a member of the Communist Party at all. She did not seek to bring herself within the qualifications of "membership" noted in *Galvan* v. *Press*, 347 U. S. 522, although the *Galvan* decision was handed down prior to her administrative hearing. *Rowoldt* v. *Perfetto*, No. 5, decided December 9, 1957—involving an issue as to the nature of "nominal", or nonpolitical, Communist Party membership—is thus inapplicable to petitioner's case, both because she did not properly raise that issue and because the facts as to her membership sufficiently show political awareness. This is indicated by the very cases on which petitioner relies, *Niukkanen* v. *Boyd*, 241 F. 2d 938 (C. A. 9) and *Jimenez* v. *Barber*, 235 F. 2d 922 (C. A. 9), in both of which the Court denied petitions for writs of certiorari on December 16, 1957, after the *Rowoldt* decision

(Nos. 121 and 25). Petitioner was shown to be a dues-paying member who attended a number of Party meetings, even though she was not one of the more active members. She was given ample opportunity to refute that testimony both at the original hearing and at the reopened hearing 28 days later. She offered no evidence at all to indicate nominal or unaware membership.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

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In the Supreme Court
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United States

OCTOBER TERM, 1957

No. 586

TORA UPSTEAD RYSTAD,
Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 586

TORA UPSTEAD RYSTAD,
Petitioner,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Tora Upstead Rystad respectfully petitions for a rehearing of the order of January 6, 1958, denying her petition for a writ of certiorari to the the Court of Appeals for the Ninth Circuit.

STATEMENT AND JURISDICTION.

On October 3, 1957, there was filed pursuant to 28 U.S.C. 1254(1) a petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit. On January 6, 1958, this Court denied that petition. This petition for rehearing is filed pursuant to Rule 58(2) of the Rules of the Supreme Court of the United States. The grounds upon which it is based are that there exist intervening circumstances of a substantial or controlling effect, and that there are substantial grounds available to petitioner for granting the petition which were not previously presented.

REASONS FOR GRANTING THE REHEARING AND THE PETITION.

1. SINCE THE DENIAL OF THE PETITION HEREIN, THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS DECIDED ONE OF THE QUESTIONS PRESENTED IN A MANNER WHICH IS IN DIRECT CONFLICT WITH THE DECISION BELOW.

Among the questions presented by the petition herein was whether the government should have produced, pursuant to petitioner's demand, the written reports concerning her made by the sole witness against her—a paid informer for the Federal Bureau of Investigation. Petitioner contended that the decision of this Court in *Jencks v. United States*, 353 U.S. 657, required the production of such reports. The government argued that *Jencks* was limited to criminal proceedings and that administrative proceedings need

not follow "judicial rules of evidence" (Br. in Op. 13-14).

Since the order denying certiorari herein, the Court of Appeals for the District of Columbia has specifically rejected the government's contention (*Communist Party v. Subversive Activities Control Board*, C.A. D.C., No. 11,850, January 9, 1958). In that case the Court reversed the Board's order upon the sole ground that the government had failed to produce the reports of an F.B.I. informer-witness.

In the case at bar, as in the one in the District of Columbia, it has been established that the witness did make contemporaneous reports which dealt with the very subject matter of his testimony; that his credibility is under the most serious attack; and that without his testimony the order could not stand. Under these circumstances, the holding in the *Communist Party* case that production is "one of the fundamentals of fair play required in an administrative proceeding" is governing here In the *Communist Party* case, the Court said:

> "We hold that, where the Government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the Government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the Government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the *Jencks* case, as we read it,

> is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result."

To say that the government is required to produce reports in a criminal proceeding which may result only in the imposition of a fine or a short term of imprisonment, or in an administrative proceeding which will result at most in an order to "register", but that it need not produce such reports in a deportation proceeding despite the "dire consequences" (Br. in Op. 13) attendant upon the latter, is to exalt form over substance and to ignore the realities of the situation presented in the case at bar.

If the government accepts the *Communist Party* decision, it can hardly claim that the rule of that case does not apply to a deportation proceeding. If the government expects to seek review of that decision, it cannot in good conscience now oppose petitioner's effort to obtain review of the self-same issue in her case.

The decision of the Court of Appeals in the *Communist Party* case directly conflicts with the holding below, and to resolve that conflict (which came into being after the denial of certiorari herein[1]), as well as to decide the important question of the applicability of *Jencks* to administrative proceedings (or at least

[1]The decision in the *Communist Party* case is a further "significant change in the law" (Br. in Op. 12) or "supervening event" (*Blair v. Commissioner*, 300 U.S. 5; *United States v. South-Eastern Underwriters Association*, 322 U.S. 533) which precludes the utilization of the first District Court proceeding as a bar here.

to deportation proceedings), the writ of certiorari should now be granted here.

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2. THE DECISION OF THIS COURT IN ROWOLDT v. PERFETTO, NO. 5, O.T. 1957, RENDERED AFTER THE PETITION HEREIN WAS FILED, REQUIRES THAT THE JUDGMENT BELOW BE REVERSED.

This Court held on December 9, 1957, two months after the petition herein was filed, that in order to constitute grounds for deportation an alien's association with the Communist Party had to be "meaningful" and his affiliation had to have " 'political' implications". *Rowoldt v. Perfetto,* No. 5, O.T. 1957. This must mean that the government is required to prove by "reasonable, substantial and probative evidence" (8 U.S.C. 1252[b][4]) something more than mere membership. We need not consider the nature or character of the additional proof thus required since none was offered in the instant case. There is nothing in the record concerning the nature of petitioner's alleged association with the Communist Party or the implications of her alleged affiliation with it. This case is indeed weaker than was *Rowoldt,* and on the basis of *Rowoldt* the judgment below should have been summarily reversed.

Here the government itself concedes that petitioner "was not one of the more active members" (Br. in Op. 17). Indeed, it never suggests that she was anything more than a nominal member, nor does it undertake to demonstrate that her associations were

"meaningful" or had "'political' implications". No findings adverse to petitioner on these issues were made at any stage of the proceedings below, nor would such findings have been supported by the record had they been made.

Although the *Rowoldt* case was pending when the petition herein was filed, it had not yet been decided and the argument here made was not then available to petitioner.

CONCLUSION.

For the foregoing reasons, this petition for rehearing should be granted, the writ of certiorari issued,[2] and the judgment below reversed.

Dated, San Francisco, California,
January 1958.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioner.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

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[2]On December 16, 1957, this Court granted certiorari in *Bonetti v. Brownell*, No. 94, O.T. 1957, in which the question of the constitutionality of the statute here involved is raised. This must mean that questions of constitutionality are still open. Petitioner therefore wishes to present as an added issue in the event rehearing is granted, the constitutionality of the statute on its face and as applied to her on the instant record.

Certificate of Counsel.

Norman Leonard hereby certifies that he is a member of the Bar of the Supreme Court of the United States, and counsel for the petitioner herein; that the within petition is presented in good faith and not for delay, and that the said petition is restricted to the grounds that there have occurred, since the denial of the petition for writ of certiorari herein, intervening circumstances of substantial or controlling effect and that there have become available, since the said petition was filed, substantial grounds which were not previously presented.

Norman Leonard.